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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR BARRAGAN, Defendant and Appellant.	G054917 (Super. Ct. No. 14CF1788) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Salvador Barragan appeals from a 25-years-to-life sentence following his conviction for the first-degree murder of Victorino Cruz. He contends his conviction should be reversed because he received ineffective assistance of counsel. He further contends the court prejudicially erred in instructing the jury on the permissible inferences that can be drawn from his possession of the victim's personal property. As discussed below, defendant has not demonstrated that his trial counsel was ineffective. In addition, although the court erred in giving the challenged instruction, the error was harmless. Accordingly, we affirm the judgment.

FACTS

The victim Cruz lived in a two-bedroom apartment in Santa Ana. He rented one of the bedrooms to Nidia and her family, and shared the master bedroom with another renter, Tomas. The master bedroom had two twin beds, one on the left and one on the right, and a dresser against the south wall. In addition to an interior door leading to the hallway, the bedroom had its own exit door.

Tomas testified that around 11:30 p.m. on May 26, 2014, Cruz brought defendant into the master bedroom and introduced him as a friend. Cruz and defendant engaged in oral sex. Later, defendant performed oral sex on Tomas. When Tomas woke up the next morning, he noticed that Cruz and defendant were dressed. Cruz and defendant went out to get some coffee, and returned to the apartment around 10:30 a.m.[1]

[1] The owner of a doughnut store in Santa Ana testified that Cruz frequented his store on an almost daily basis. On the morning of May 27, 2014, Cruz entered the store with a light-skinned male companion, whom the owner had never seen before. The two men left the store at around 10:30 a.m. The owner provided a surveillance video-recording of the encounter to police officers, and the video was played for the jury.

Before Tomas went to work, he privately gave defendant his phone number. While Tomas was at work, he received two text messages from defendant. The first asked how he (Tomas) was doing. "A little while later," defendant sent a second text message to the effect that he had left Cruz's apartment because Cruz's boyfriend had arrived. Tomas testified that Cruz did not have a boyfriend or partner at the time.[2]

The other renter, Nidia, testified that on May 27, 2014, at around 12:30 p.m., she saw defendant together with Cruz in the apartment. Later that afternoon, Nidia left to pick up her daughter and returned at around 7:00 p.m. Shortly thereafter, Cruz entered the apartment carrying some bags. He left the bags in the kitchen, and then went into his bedroom and closed the door. Nidia never saw Cruz alive again.

Cruz's nephew testified that at around 7:20 pm on May 27, 2014, he returned a call from Cruz and spoke with his uncle for about 10 minutes.

Nidia testified she left with her children to go shopping and returned to the apartment around 8:00 p.m. At around 8:30 p.m., she went into her bedroom to sleep, but her teenaged daughter stayed in the living room to watch some television. Nidia woke up around 10:00 p.m. and saw that her daughter was not in bed. She went into the living room to check on her daughter, and noticed a strong scent of bleach. Nidia asked her daughter whether Cruz had come out to wash some clothes, and her daughter replied that she had not seen anything. Nidia and her daughter then went to their bedroom to sleep.

A resident of the apartment complex, Douglas S., testified that around 9:30 p.m. on May 27, 2014, he was taking a walk when he happened to glance into Cruz's apartment. He saw a light-skinned man sitting in a chair next to a floor lamp. The man looked physically and mentally spent. When shown a photographic line-up to

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[2] A police officer who saw both text messages from defendant on Tomas's phone testified that the first text message had a 7:27 p.m. time-stamp and the second had a 2:08 a.m. time-stamp. The second text stated in Spanish: "I came to work. A guy came over, his boyfriend."

identify the person he saw in Cruz's apartment, Douglas selected two pictures, one of which was defendant's picture.

Tomas came home from work around 1:00 a.m. on May 28, 2014. When Tomas tried to enter the master bedroom, he discovered it was locked. Tomas went out the sliding door to the porch to peer into the bedroom. He observed that the television was on in the bedroom. Tomas yelled three times, "Victorino, open the door for me, please." After getting no response, he grabbed a knife from the kitchen and pried open the door to the master bedroom. When Tomas opened the door, he smelled the odor of bleach. He turned on the light and saw that the room was in disarray. A backpack with papers was tossed in the bathtub. Tomas recognized the papers to be his financial and tax documents. Cruz's bed was broken and the locked top drawer of the dresser was open. On Tomas's bed were "blankets and other stuff." Tomas thought there had been a burglary.

Tomas knocked on Nidia's door and asked her whether she knew what had happened. After Nidia responded in the negative, Tomas told her, "Well, come, come so you can see." Nidia observed that the master bedroom was in disarray and the television was on. Tomas said, "Well, I told Victor not to bring men in." "Surely they've robbed me." Tomas told Nidia that he would begin cleaning up and wait for Cruz to "find out what happened." Nidia returned to her room, and Tomas began cleaning up. As Tomas lifted up a sheet, he saw Cruz's dead body. Tomas went to Nidia and told her, "I think that Victorino is dead." He told her to have her daughter call the police. When the officers arrived, Tomas recounted his observations about defendant and Cruz, and provided the officers with defendant's cell phone number.

When Santa Ana police officers responded to the crime scene, they noticed a strong odor of bleach upon entering the master bedroom. Cruz was lying on the floor between the beds. He had blood on his head and chest areas, and "what appeared to be an electric cord wrapped around his neck." The cord had a pattern of four dots on it. A hair

brush was fashioned into a "windlass to crank on the cord." Cruz's shirt was bloody, his pants zipper was down, and his pants pockets were inside out. Inside the bedroom, there were two opened bleach bottles, one on its side and one upright. There was also an iron whose electrical cord had been cut.

Officer Andrade testified that he and his partner received a photograph of defendant and cell phone location information indicating that defendant was at a Mexican restaurant in Anaheim. The officers observed defendant enter the restaurant with a dark-colored backpack. After waiting about 20 minutes for backup, Andrade approached defendant, who was standing at the rear of the restaurant. After Andrade identified himself as a police officer, defendant—who appeared nervous—did not give his true name, but gave several different and false names.

Homicide Detective Jim Garcia testified that on May 28, 2014, at around 7:20 pm., he arrived after Officer Andrade had contacted defendant. Defendant was standing next to Officer Andrade's unmarked police vehicle, and a cell phone was lying on the car's trunk. When an officer called the cell phone number that Tomas had provided them, that cell phone began ringing. Officer Garcia told defendant that he was investigating an assault and asked defendant to go to the police station. Defendant told the officer he wanted to retrieve a blue backpack and a white bag he had left inside the restaurant. After retrieving the items, defendant was transported to the police station.

After defendant was arrested, officers noticed he had a scratch on his right bicep and four "little dots" on his right wrist. There was redness or "slight raising on the skin surface" on both of defendant's arms, consistent with the use of bleach without gloves. Photographs showing defendant's arms and right wrist were published to the jury. During the booking search, defendant removed a wallet from his pocket. In the wallet was a "paper card with a check" from Cruz's bank account and a credit card in Cruz's name. Tomas testified that the blue backpack recovered at the Anaheim restaurant was his property. Inside the backpack was a laptop computer and computer cord, which

Tomas identified as belonging to Cruz, and a cell phone, which Tomas testified was similar to an old phone owned by Cruz.

Detective Garcia also testified that officers tracked Cruz's cell phone. On June 19, 2014, the detective called the number assigned to that phone. A man answered and gave his name as "Jose." The detective identified himself and asked Jose where he got the phone. Jose said that someone in front of a phone store in Downey gave it to him. The detective asked Jose if they could meet, but Jose hung up.

Forensic pathologist Aruna Singhania testified she performed an autopsy on Cruz's body. She opined that the cause of death was compression of the neck due to ligature strangulation. She also opined that Cruz suffered a blow to the back of his head which was hard enough to render a person unconscious. There were chemical burns to his abdomen and arms consistent with postmortem exposure to bleach.

Two forensic scientists testified that bleach significantly degrades D.N.A. and other forensic evidence. No D.N.A. or latent fingerprints were recoverable from the electrical cord or hairbrush. Swabs taken from Cruz's left palm, back of his right hand and left lower abdomen indicated another person's D.N.A. was present, and defendant could not be excluded as the contributor to that D.N.A. Defendant (and Tomas) were excluded as the contributor of the foreign D.N.A. found in Cruz's left pants pocket.

A custodian of records for Sprint testified that the prosecution had subpoenaed cell phone records for defendant and Cruz. The custodian testified that cell phone records were kept by Sprint and made in the ordinary course of Sprint's business. The data entries in the records were made at or near the time they actually occurred. The custodian authenticated trial exhibits 102, 102A, 103 and 103A, as the phone records produced by Sprint. Those records listed the numbers called, the starting and ending times, the duration, and the network element (switch), that handled the call. They did not include cell site location information.

Bruce Linn testified as an expert on cell phone records, cell phone towers and cell phone tracking. Linn has studied the cellular networks belonging to Sprint, T-Mobile and AT&T. Linn explained that a cell phone utilizes or pings a cell tower to facilitate voice calls. Each tower's 360 degrees of coverage is divided into three sectors, roughly 120 degrees each. Generally, the cell phone would access the network element in the closest sector of the nearest tower. A former Anaheim police officer, Linn testified he used cell phone location information (CSLI) to find fugitives, as well as "missing elderly, at-risk youth and missing hikers."

Linn testified that in this case, he reviewed exhibits 102, 102A, 103 and 103A. From those exhibits and other call detail reports obtained from Sprint, he used a computer program to map out the general locations where the cellular phones were located, based on the assumption that the cell phone pinged the network element in the nearest sector of the cell tower. Linn testified that he had access to Sprint's "master tower list," which showed the physical address of the towers. On cross-examination, Linn admitted he did not ensure that the master tower list was accurate, for example, by physically going to the location to ensure that the tower was still located at the address. The resulting maps—trial exhibits 105 through 115—showed that from around 6:38 p.m. until around 10:52 p.m. on May 27, 2014, defendant's phone was still in the sector that included the crime scene. At around 11:09 p.m., the phone moved from one sector to an adjacent sector.

Defendant did not testify, but the defense submitted two stipulated pieces of evidence—(1) cell phone records for a number associated with Cruz, and (2) expert opinion that shoeprints found on an air conditioning compressor unit right outside Cruz's bedroom did not resemble prints from shoes recovered from defendant when he was arrested.

DISCUSSION

Assistance of Trial Counsel

Defendant contends trial counsel was ineffective in two separate, but related, ways: (1) by failing to object to the People's acquisition of his cell phone's CSLI on the ground that the location information was obtained in violation of the Fourth Amendment of the federal Constitution; and (2) by failing to object to Linn's expert opinion on grounds of lack of foundation, hearsay, and denial of his right of confrontation.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) As to counsel's representation, "[a] reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*Ibid.*)

Failure to Object to the Search and Seizure of CSLI

The police obtained defendant's phone's CSLI within hours after responding to the crime scene. The information was used to track defendant to the Mexican restaurant in Anaheim the evening following the murder of Cruz. Linn, the prosecution's expert on cell phone tracking, used CSLI to render his expert opinion that defendant's phone was located within the sector containing the crime scene from approximately 6:38 p.m. until 10:52 p.m. Linn produced his expert report in November 2016.

Defense counsel did not move to suppress the search and seizure of the CSLI. However, counsel filed a pretrial motion to exclude any testimony relating to CSLI. Specifically, she sought to exclude: (1) any testimony that defendant's cell phone accessed cell sites Nos. 530504 and 30827 on May 27, 2014 at 6:38 p.m.; (2) any testimony that his cell phone accessed cell site No. 30827 at 7:25 p.m.; and (3) any testimony that his cell phone accessed cell site No. 30827 during calls to "1-800 4 My Taxi" on May 27, 2014 between 10:40 p.m. and 10:54 p.m. The court denied the motion.

After briefing was completed in this case, the United States Supreme Court, in a 5 to 4 decision, held that "the Government must generally obtain a search warrant supported by probable cause" before acquiring CSLI from a wireless carrier. (*See Carpenter v. United States* (2018) __ U.S. __, 138 S.Ct. 2206, 2208 (*Carpenter*).) There, after four suspects were arrested on suspicion of robbery, one suspect confessed to nine different robberies and identified 15 other accomplices. Based on that information, the prosecution applied for court orders to compel two wireless companies to disclose cell site location for a suspect's (Carpenter's) cell phone. (*Id.* at p. 2212.) Prior to trial, Carpenter moved to suppress the cell-site data, and the trial court denied the motion to suppress. (*Ibid*.) The high court concluded that the motion to suppress should have been granted. It held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." (*Id*. at p. 2217.) It rejected the argument that the third-party doctrine—under which the high court previously held that a person has no legitimate expectation of privacy in information he or she voluntarily turns over to third parties—applied (*id*. at pp. 2219-2220), based on "the unique nature of cell phone location information" (*id.* at p. 2220). Finally, the high court noted that the warrant requirement to obtain CSLI is subject to case-specific exceptions, including the well-recognized exception for exigent circumstances. "Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." (*Id*. at p. 2223.)

Although *Carpenter* held that the government may not obtain CSLI without a warrant backed by probable cause, defendant has not shown trial counsel's failure to move to suppress evidence of CSLI on Fourth Amendment grounds constituted ineffective assistance.

First, trial counsel was not ineffective for failing to anticipate *Carpenter*. (See *Green v. Johnson* (5th Cir. 1997) 116 F.3d 1115, 1125 ["there is no general duty on the part of defense counsel to anticipate changes in the law"].) At the time of defendant's trial, several federal appellate courts had held that a warrant was not required to obtain CSLI. (See, e.g., *U.S. v. Davis* (11th Cir. 2015) 785 F.3d 498, 511-513 [en banc]; *In re U.S. for Historical Cell Site Data* (5th Cir. 2013) 724 F.3d 600, 611-615.) Defendant acknowledges that no California case held to the contrary at the time of his trial. Additionally, before *Carpenter*, the high court's third-party doctrine enunciated in *Smith v. Maryland* (1979) 442 U.S. 735 (*Smith*) and *United States v. Miller* (1976) 425 U.S. 435 (*Miller*) arguably permitted warrantless acquisition of CSLI from a third-party wireless carrier. Under that doctrine, information provided to a third party, including banking information and phone numbers dialed, is not subject to the warrant requirement of the Fourth Amendment. (See *Smith*, at pp. 742-743 [individual has no legitimate expectation of privacy in the numbers he dials on his phone in the privacy of his home]; *Miller*, at p. 442 [individual has no legitimate expectation of privacy in banking documents, including checks and deposit slips].) *Carpenter* affirmed the validity of *Smith* and *Miller*, but concluded that the doctrine did not apply to CSLI due to its "unique nature." (See *Carpenter*, *supra*, 138 S.Ct at p. 2220.) However, at the time of defendant's trial, it was not unreasonable for an attorney to conclude that *Smith* and *Miller* controlled.

Second, and even more significantly, defendant has not established that the CSLI was obtained in violation of the Fourth Amendment. Because no suppression motion was filed, the circumstances under which the prosecution obtained the CSLI for defendant's cell phone are not in the record. Thus, for all that the record discloses, the

CSLI may have been obtained with a valid warrant or under exigent circumstances. Indeed, as the parties acknowledge on appeal, a slide prepared in connection with the prosecutor's opening statement suggests that the CSLI was obtained "via exigency warrant." If true, trial counsel was not required to object to the search and seizure of defendant's phone location information on the basis that it violated the Fourth Amendment. As the California Supreme Court has stated, "An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [rejecting an ineffective assistance claim on direct appeal where no suppression motion was made].) Thus, we reject defendant's claim that trial counsel was ineffective for failing to suppress CSLI evidence.

Failure to Object to Linn's Expert Testimony

The cell phone records admitted into evidence at trial—trial exhibits 102, 102A, 103 and 103A—did not contain CSLI. However, Linn testified that he created his location maps and rendered his expert opinion based on cell phone records ("call detail reports") containing CSLI (cell tower and sector). These records were not produced at trial. Defendant contends the failure to produce these records (1) eviscerated the foundation of Linn's opinion, (2) rendered the opinion inadmissible as based on case-specific hearsay, and (3) subjected the opinion to challenge on the ground he was denied his right to confront the person who produced the records. Accordingly, defendant argues trial counsel was ineffective for failing to object to Linn's expert testimony on the grounds of lack of foundation, hearsay, and denial of his right of confrontation. We disagree.

People v. Sanchez (2016) 63 Cal.4th 665 (*Sanchez*) is instructive on defendant's challenges to Linn's expert testimony. In *Sanchez*, the California Supreme Court discussed, in the context of gang expert testimony, when an expert can rely on hearsay to render an expert opinion. The court held that unless testifying in the form of a proper hypothetical question, an expert may not rely on "case-specific out-of-court statements to explain the basis for his opinion," unless those hearsay statements "are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.) Such case-specific hearsay involves factual assertions "relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) In addition, if "a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation . . . ." (*Id*. at p. 686.) "[H]earsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . , or for some primary purpose other than preserving facts for use at trial." (*Id*. at p. 694.)

Here, Linn's expert opinion about the probable locations of defendant's cell phone are based on case-specific facts—that defendant's cell phone pinged a specific sector of a specific cell tower at certain times. Linn testified these case-specific facts were stated in call detail reports containing CSLI. Those reports were never introduced into evidence at trial. Thus, the case-specific factual assertions that defendant's phone pinged certain cell-tower sectors are hearsay, i.e., out-of-court statements offered for the truth of the matter stated.

However, although Linn relied on case-specific hearsay, defendant has not demonstrated that his trial counsel was ineffective for failing to object on that basis. Defendant has not shown that the call detail records containing CSLI relied upon by Linn were *inadmissible* hearsay. *Sanchez* specifically held that an expert may rely on case-specific hearsay that falls within an exception to the hearsay rule. (*Sanchez, supra,* 63 Cal.4th at p. 686.) Call detail reports with CSLI are generally admissible under the business record exception. (*People v. Zavala* (2013) 216 Cal.App.4th 242, 248 (*Zavala*).)

And, although the call detail records Linn relied upon were not in evidence, the custodian of records for Sprint testified that cell phone records kept by Sprint were made in the ordinary course of Sprint's business. The parties did not dispute the admissibility of call detail reports at trial. For example, they stipulated to the admissibility of the call detail reports for Cruz's phone. Although defendant asserts the manner by which Linn acquired the call detail reports with CSLI might undermine the applicability of the business record exception, case law is to the contrary. (See *id*. at p. 248 ["printed compilation of call data produced by human query for use at trial falls under the business record exception"].) Defendant has not shown that a hearsay objection would have been sustained, or that the People would have been unable to overcome the objection by application of the business record exception. Moreover, there is a plausible tactical reason for not objecting to the case-specific hearsay. Trial counsel may not have wanted to draw additional attention to the CSLI evidence in light of its likely admissibility under *Sanchez* and *Zavala*. (See *People v. Huggins* (2006) 38 Cal.4th 175, 206 [trial counsel was not ineffective for failing to object to prosecutor's comments because "counsel could have preferred not to draw the jurors' attention to particular comments by the prosecutor by objecting to them."]; *People v. Hawkins* (1995) 10 Cal.4th 920, 942, abrogated on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101 [counsel was not ineffective for failing to seek a limiting instruction because counsel could reasonably conclude that the instruction may suggest that the prosecution's evidence was "relatively strong" and the benefits for seeking instruction was "questionable"].) Thus, trial counsel was not ineffective for failing to object to Linn's testimony on the ground of hearsay. (See *People v. Freeman* (1994) 8 Cal.4th 450, 490–491 ["Because the decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence"].)

For the same reasons, defendant has not shown that his trial counsel was ineffective for failing to object to Linn's expert testimony for lack of foundation. Admissible case-specific hearsay would provide the foundational facts for Linn's opinion

on the probable locations of defendant's cell phone on the evening of the murder and defendant fails to show that a foundational objection would have been sustained, or otherwise not overcome with additional available evidence.

Finally, defendant has not shown that the call detail records containing CSLI are testimonial in nature. As the United States Supreme Court has stated: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." (*Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305, 324.) Thus, the call detail reports containing CSLI are not testimonial in nature. (See *U.S. v. Yeley-Davis* (10th Cir. 2011) 632 F.3d 673, 679 [cell phone records are not testimonial]; *U.S. v. Green* (11th Cir. 2010) 396 Fed.Appx. 573, 575 ["cell phone records and cell tower location information . . . are non-testimonial for purposes of the Sixth Amendment"]; *U.S. v. Flores* (5th Cir. 2008) 286 Fed.Appx. 206, 214 [phone records are not testimonial in nature].)

In sum, Linn relied on case-specific hearsay in rendering his expert opinion, but defendant has not shown that an objection on this basis would have been sustained under the business record exception or that a foundational objection would not have been overcome by receipt of additional evidence of the foundational requirements for the business records exception. Without a showing that the objection would have been successful, defense counsel cannot be criticized for failing to engage in a futile act. In addition, the case-specific hearsay was non-testimonial. Thus, the confrontation clause was not implicated. In short, defendant has not shown there was a basis to object to Linn's expert testimony on the grounds of lack of foundation, hearsay or denial of confrontation rights. Accordingly, trial counsel has not been shown to be ineffective for failing to raise these objections.

Instructional error

Defendant contends the trial court erred in giving, sua sponte, an instruction regarding permissible inferences that may be drawn from his possession of stolen property, based on a modified version of CALCRIM No. 376. He argues that giving the modified CALCRIM No. 376, lowered the prosecution's burden of proof and should not have been given when the only crime charged was the nontheft offense of murder. We disagree that there was reversible error.

When the court and the parties were discussing proposed jury instructions, the court noted that although the prosecution had not requested CALCRIM No. 376, it believed the instruction should be given because "the victim's property was in the possession of the defendant post homicide. And [CALCRIM No.] 376 . . . tells the jurors that they can't convict on this alone." Neither party objected.

Subsequently, the court gave the following instruction: "If you conclude that the defendant knew he possessed property and you conclude that the property had, in fact, been recently stolen, you may not convict the defendant of murder or manslaughter based on those facts alone. However, if you find—also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove that he committed murder or manslaughter. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property along with any other relevant circumstances tending to prove his guilt of murder or manslaughter." "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to that conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

People v. Prieto (2003) 30 Cal.4th 226 (*Prieto*) is instructive. There, the California Supreme Court addressed defendant's exact claims with respect to CALJIC No. 2.15, the predecessor of CALCRIM No. 376. (See *People v. O'Dell* (2007) 153

Cal.App.4th 1569, 1575 ["Effective January 1, 2006, the Judicial Council of California adopted the California Criminal Jury Instructions (CALCRIM), revising the criminal jury instructions to simplify their language and make them more accessible to lay jurors. CALCRIM No. 376 uses language which is very similar to the language of CALJIC No. 2.15"].)[3]

The *Prieto* court first rejected the defendant's contention that "the trial court's instruction mandates reversal because it lowered the prosecution's burden of proof." (*Prieto*, *supra*, 30 Cal.4th at p. 248.) It explained: "CALJIC No. 2.15 did not directly or indirectly address the burden of proof, and nothing in the instruction absolved the prosecution of its burden of establishing guilt beyond a reasonable doubt. Moreover, other instructions properly instructed the jury on its duty to weigh the evidence, what evidence it may consider, how to weigh that evidence, and the burden of proof. In light of these instructions, there is 'no possibility' CALJIC No. 2.15 reduced the prosecution's burden of proof in this case." (*Ibid.*) The same reasoning applies to the instant case. CALCRIM No. 376 does not absolve the prosecution of its burden of establishing guilt beyond a reasonable doubt. Indeed, as given, the modified CALCRIM No. 376 instructs the jury that it cannot convict defendant of murder "unless you are convinced that each fact essential to that conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." The jury also was instructed on how to consider and weigh evidence, that the People must prove the defendant is guilty beyond a reasonable doubt,

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[3] Specifically, the high court addressed the following instruction: "If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant [name] is guilty of the crimes charged. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider the attributes of possession-time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, any other evidence which tends to connect the defendant with the crime charged.'" (*Prieto*, 30 Cal.4th at p. 248, fn. 5.)

and that it could not convict defendant of murder "unless you are convinced that each fact essential to that conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." In sum, the court's instruction with the modified CALCRIM No. 376 did not lower the prosecution's burden of proof.

However, we agree with defendant that the giving of modified CALCRIM No. 376 was erroneous under state law. In *Prieto*, the high court concluded that it is error to use CALJIC No. 2.15 with respect to "nontheft offenses like rape or murder." (*Prieto*, 30 Cal.4th at p. 248-249.) The Court explained that "'[p]roof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder." (*Id.* at p. 249.) Likewise, here, the court erred in giving the modified CALCRIM No. 376 because the only charge was the nontheft offense of murder.[4]

Nevertheless, the court's instruction with the modified CALCRIM No. 376 was harmless because there was no reasonable likelihood the jury would have reached a different result had the court not given CALCRIM No. 376. (*Prieto, supra*, 30 Cal.4th at p. 249 [error in giving CALJIC No. 2.15 examined for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836].) Defendant had a possible motive to kill Cruz—the personal property in the master bedroom. Based on the evidence, Cruz was killed some time after 7:20 p.m., when Cruz spoke with his nephew, and before 10:00 p.m., when Nidia smelled the strong odor of bleach. Tomas and Nidia both saw defendant in Cruz's bedroom hours before Cruz was found dead. A neighbor saw a light-skinned male in Cruz's bedroom at around 9:30 p.m., and selected defendant's photograph as one of two photographs depicting someone who looked like the male suspect. Cruz's lower body was doused with bleach, and defendant's arms had symptoms (redness and irritation) associated with the use of bleach without protective gear. Cruz was killed with an electrical cord, and

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[4] We note that the Bench Notes for CALCRIM No. 376 states, "Use of this instruction should be limited to theft and theft-related crimes."

defendant's wrist had four dots similar to the four-dot pattern on that cord. Defendant's cell phone was in the same general location as the crime scene from 6:38 p.m. until 10:52 p.m. Finally, when arrested the following evening, defendant appeared nervous and would not give the police his true name. On this record, it is not reasonably probable that defendant would have obtained a more favorable outcome had the jury not been instructed with the modified CALCRIM No. 376.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.